

## LEARY LECTURE ABERRATIONS NO MORE

Owen Fiss\*

September 11, 2001 marked the beginning of a new era in American law. Combating terrorism became a matter of great public urgency and as part of that endeavor policies have been pursued that compromise once sacred principles of the Constitution. These policies were initiated by President George W. Bush, but with some exceptions, other branches of government soon endorsed them, and remarkably, they are now being continued by President Barack Obama.

Although terrorism did not begin on 9/11, the attacks on that day were distinguished by the magnitude of the death and destruction that they caused. Those attacks also had the threatening quality of a foreign invasion. Important sites in the United States—the World Trade Center and the Pentagon (and if the terrorists had their way, the Capitol and White House would have been added to the list)—were struck by foreign nationals acting on directions from abroad. Moreover, the events of 9/11 became a public spectacle. Scenes of airplanes crashing into the World Trade Center and the collapse of the towers were caught on video and frequently replayed in later years. The messages conveyed and the fears aroused by these images were further reinforced in the decade that followed by bombings in London, Madrid, Amman, Mumbai, and Bali; attempts to blow up two airplanes on their way to the United States; and the failed plot to detonate a car full of explosives in Times Square. As a result, starting on September 11, 2001, and continuing to this day, terrorism acquired an immediacy and reality for Americans that it never had before.

The government's response to the attacks of 9/11—Bush's announcement of a "War on Terror"—also endowed the events that occurred on that day with special significance. This declaration of war was intended to mobilize the American people and it had that effect. It prioritized the need to respond to the risk of terrorism and prepared the public for the sacrifices that such a response would entail. In that respect, Bush was following the practice of earlier presidents who had declared a "War on Poverty," a "War on Drugs," and even a "War on Cancer," but there was one important difference—Bush soon employed the military to achieve his objectives.

In the fall of 2001, Bush determined that Al Qaeda, a far-flung organization that operates in secret, was responsible for the 9/11 attacks. He then began what can properly be regarded as a war against Al Qaeda. He unleashed the military force of the United States and charged it with the task of capturing or targeting

---

\* © 2010 Owen Fiss. This essay is based on the William H. Leary Lecture at the S.J. Quinney College of Law, at the University of Utah, on October 26, 2010. Many thanks to Dean Hiram Chodosh and Professor Chibli Mallat for their generous welcome to the Law School. I also wish to gratefully acknowledge the research and editorial assistance of Trevor Sutton and Sara Solow.

Osama Bin Laden and other leaders of Al Qaeda. At the same time, Bush ordered the invasion of Afghanistan, then controlled by the Taliban, on the theory that a symbiotic relationship existed between the Taliban and Al Qaeda. In March 2003, the president broadened the United States military operations in the Middle East and invaded Iraq, then controlled by Saddam Hussein and the Baath Party. Although the 9/11 terrorist attacks were not the basis of that military endeavor, terrorism, sometimes at the hands of Al Qaeda, was a consequence of the invasion of Iraq and the occupation that inevitably followed.

In his war against terrorism, Bush instituted a number of practices that violated principles long viewed as hallmarks of our constitutional tradition. One such principle is the prohibition against torture. This prohibition is not only rooted in an international treaty and a federal statute implementing that treaty, but also in the Fifth and Eighth Amendments of the Bill of Rights. Soon after 9/11, however, the White House turned to lawyers within the executive branch for legal opinions that narrowed the definition of torture to allow the use of interrogation techniques such as waterboarding—to induce the fear of imminent death by drowning—that are almost universally condemned as torture.

During this same time, suspects were secretly sent to other countries, such as Syria and Egypt, that routinely torture their prisoners and subject them to abuses that would qualify as torture even under the Bush administration's narrow definition. This practice, known as extraordinary rendition, and more properly seen as a form of outsourcing,<sup>1</sup> is as much a violation of the rule against torture as when officials of the United States engage in torture themselves.

Bush also instituted a detention policy that threatened another principle of our constitutional order—what I have elsewhere called the principle of freedom.<sup>2</sup> This principle prohibits the executive from incarcerating anyone without charging that individual with a crime and swiftly bringing him to trial. There are exceptions to this principle, including one for war. Under this exception, the executive is allowed to detain enemy combatants captured on the battlefield and hold them for the duration of hostilities. Bush invoked this exception and then construed it in a way that threatened to undermine the very values that the principle of freedom seeks to protect.

Bush did not confine himself to imprisoning persons seized in Iraq, Afghanistan, or even the mountainous region between Afghanistan and Pakistan. Rather, he treated the entire world as if it were a battlefield, even to the point of seizing persons within the United States, including American citizens, and treating them as enemy combatants. Bush also refused to place any temporal limits on this policy of imprisonment without trial and was prepared to incarcerate persons for prolonged, indefinite periods of time—maybe for life. Although he said he would

---

<sup>1</sup> Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106, 106–23, available at [http://www.newyorker.com/archive/2005/02/14/050214fa\\_fact6](http://www.newyorker.com/archive/2005/02/14/050214fa_fact6).

<sup>2</sup> Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 235–36 (2006).

hold these individuals only until the end of the War on Terror or, more modestly, until the end of the war against Al Qaeda, the end of this war is not readily foreseeable. Even if Osama Bin Laden were captured, new leadership is likely to emerge, and in any event, the many cells of Al Qaeda are capable of acting on their own. Extending the exception to the principle of freedom for wartime captures to a never ending war of this sort threatens to undermine the principle itself.

All of the prisoners subject to Bush's detention policy were held incommunicado, but sometimes a friend or relative, or even a volunteer lawyer, discovered a prisoner's whereabouts and filed a petition of habeas corpus on his behalf. These petitions claimed that the prisoner was not in fact an enemy combatant, and thus there was no legal authority for the executive to detain him, even under the rule allowing wartime captures. Nevertheless, the Bush administration resisted any factual inquiry by the judiciary into the merits of these claims.

For prisoners who were American citizens, and thus held in prisons within the United States, the government sought to limit the evidentiary inquiry by the federal judiciary.<sup>3</sup> The government insisted that an affidavit filed by an official in the Department of Defense explaining the basis for the incarceration should be accepted at face value and treated as sufficient for detaining the prisoners. The government maintained that there could be no judicial probe into the adequacy of the affidavit and no opportunity for the prisoner to offer evidence to substantiate his claim that he was not an enemy combatant.

For foreign nationals being held abroad, including those at Guantánamo, the government took the position that these prisoners had no right to habeas corpus whatsoever.<sup>4</sup> According to the government, foreign nationals held abroad had no constitutional rights, including the right to personal freedom, and thus the writ of habeas corpus served no function.

Although the Bush administration claimed that it had the right to hold anyone it classified as unlawful enemy combatants for prolonged, indefinite periods, it also claimed the right to place some on trial for their actions on behalf of Al Qaeda or the Taliban. Some of these individuals were to be tried in ordinary civilian courts. One, an American citizen named John Walker Lindh, who had been captured in Afghanistan and acknowledged that he had fought for the Taliban, was charged in federal court and accused under federal criminal statutes of attempting to kill American personnel.<sup>5</sup> The administration also used civilian courts to indict or try a number of persons accused of being agents of Al Qaeda who had been arrested and imprisoned in the United States. One was an American citizen seized at O'Hare airport in Chicago and another was a citizen of Qatar who had been studying in the United States.<sup>6</sup> Bush did not, however, limit himself to the use of civilian courts. In

---

<sup>3</sup> Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 572, 605–09 (S.D.N.Y. 2002).

<sup>4</sup> Rasul v. Bush, 542 U.S. 466 (2004).

<sup>5</sup> United States v. Lindh, 212 F. Supp. 2d 541, 552–58 (E.D. Va. 2002).

<sup>6</sup> See United States v. Padilla, No. 04-60001-CR-COOKE, 2006 WL 3678567 (S.D. Fla. 2006); Al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004).

November 2001, he issued an Executive Order authorizing the use of military commissions to try terrorists.<sup>7</sup> By 2005, the administration determined that twenty detainees being held in Guantánamo were to be tried by military commissions established pursuant to the president's Executive Order.

In the midst of an ongoing conflict, military commissions have been convened on the battlefield and used to try enemy soldiers accused of war crimes. Now and then, we departed from this tradition; for example, in World War II a military commission was used, with the reluctant approval of the Supreme Court, to try Nazi soldiers who had entered the country for purposes of sabotage.<sup>8</sup> Bush's decision to use military commissions in Guantánamo built on this precedent and ignored the intervening advances in our understanding of due process that occurred during the Warren Court era. Bush's plan also vastly expanded the jurisdiction of military commissions. It contemplated using military commissions to try a group of prisoners that had been incarcerated for years at Guantánamo, far from any battlefield. And it did not limit the commissions to trying offenses that were proscribed by the laws of war. In this way, Bush had effectively transformed the military commission from a tribunal of necessity to one of convenience, giving the prosecution advantages that are anathema to the constitutional dictates of due process.

Under Bush's scheme, trials of Guantánamo prisoners were to be carried out by military officers subject to supervision by an official in the Department of Defense.<sup>9</sup> The rules of evidence permitted the introduction of a wider range of hearsay evidence than would be allowed in federal court. Any evidence that had probative value was admissible. There were no protections against the use of confessions obtained by coercion or even torture. The accused could be convicted on the basis of evidence that neither he nor his counsel saw or heard. The accused's choice of counsel also was strictly circumscribed. In addition, Bush's commissions compromised the accused's right to trial by jury and the right to a speedy and public trial.

In conducting his War on Terror, Bush also showed little respect for the Fourth Amendment protection of privacy. In the immediate wake of 9/11, he authorized the National Security Agency (NSA) to tap telephones without prior judicial authorization.<sup>10</sup> These taps were aimed at international telephone calls between persons in America and individuals abroad suspected of having ties to Al Qaeda. In 1967, when the Supreme Court ruled that wiretapping was the functional equivalent of a search, and thus subject to the warrant requirement of the Fourth Amendment, it reserved the question of whether such a rule would extend to

---

<sup>7</sup> Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002), *reprinted in* 10 U.S.C. § 801 (Supp. IV 2004).

<sup>8</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>9</sup> Military Order of November 13, sec. 4.

<sup>10</sup> U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1-3 (2006), *available at* <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf>.

national security cases.<sup>11</sup> The case before the Court involved telephone calls of a suspected gambler.<sup>12</sup> In 1972, the Supreme Court extended the warrant requirement of the Fourth Amendment to a prosecution involving the bombing of a C.I.A. building in Ann Arbor, Michigan.<sup>13</sup> In that case, the Supreme Court once again reserved the question of whether the warrant requirement should apply to wiretaps aimed at obtaining foreign intelligence.<sup>14</sup>

Unprepared to wait for further clarification by the Supreme Court, in 1978 Congress passed a statute—the Foreign Intelligence Surveillance Act (FISA)—that required warrants for wiretaps seeking foreign intelligence and established a new tribunal with streamlined procedures for obtaining such warrants.<sup>15</sup> These warrants were to be issued by a tribunal that operated in secret and whose judges were appointed by the chief justice.<sup>16</sup> Bush's NSA wiretapping program violated the very terms of the 1978 statute and, even more fundamentally, the constitutional principles that it sought to further. The warrant requirement creates a check on arbitrary executive action and, to that end, protects the Fourth Amendment's right of private communication so essential to the development of the human personality and political freedom.

Some have depicted the five practices that I have identified—interrogation under torture, imprisonment without trial, denial of habeas corpus, unfettered use of military commissions, and warrantless wiretapping—as entirely the work of Bush and his close circle of advisors. So characterized, these practices have been denounced as excesses of Bush's unilateralism and a violation of separation of powers, which at least from one reading, requires collaboration among the three branches of government. There is an element of truth to this charge—in conducting his War on Terror, Bush made extravagant claims about the power of the presidency—but such a charge should not obscure a deeper and more fundamental truth: although the president led the way, the other branches were complicit in this assault on the Constitution. At issue, therefore, was not simply separation of powers, but rather the constitutional principles prohibiting torture, protecting personal freedom, assuring fair procedures, and guaranteeing privacy.

In December 2005, Congress passed the Detainee Treatment Act.<sup>17</sup> One part of that statute, spearheaded by Senator John McCain, prohibits American officials from inflicting torture wherever they might act and against whomever they act.<sup>18</sup> Bush fiercely resisted this measure as it made its way through Congress, and when he eventually signed the bill he issued one of his most notorious signing

---

<sup>11</sup> *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967).

<sup>12</sup> *Id.* at 348.

<sup>13</sup> *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 317–21 (1972).

<sup>14</sup> *Id.* at 309.

<sup>15</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

<sup>16</sup> *Id.* § 103.

<sup>17</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, (codified at 42 U.S.C. § 2000dd (2006)).

<sup>18</sup> *Id.* § 1006(a)(1).

statements.<sup>19</sup> In it, Bush called attention to the fact that the McCain measure provided no remedy for the enforcement of the ban on torture. The president also said that he was signing the bill into law with the understanding that he would not allow it to compromise his duties as commander in chief.

This assertion of his power as commander in chief was an affront to the constitutional allocation of power, which grants Congress authority to share in the regulation of the activities of the armed forces.<sup>20</sup> Even more striking, Bush's assertion of power gave no recognition to the fact that the McCain measure was only a codification of the ban on torture rooted in the Fifth and Eighth Amendments, which most assuredly limit the president's power as commander in chief. Bush's signing statement not only disputed the power of Congress, but also the constitutional tradition that subordinates all executive action, even the exercise of an enumerated power, to the Bill of Rights.

The other provisions of the Detainee Treatment Act of 2005 posed no such confrontation with the president. Rather, the Act affirmed Bush's program of executive detention. The Act specifically denied the writ of habeas corpus to all the prisoners at Guantánamo.<sup>21</sup> It also acknowledged, and thus approved, the system of military tribunals—the so-called Combatant Status Review Tribunals—established on the island in July 2004, more than two years after the prison was opened, to hear claims of prisoners who denied any connection to Al Qaeda or the Taliban or any other terrorist organization.<sup>22</sup> These tribunals were staffed by military officers operating under the most lax evidentiary rules, and there was no provision for legal representation of the prisoners. Review of the decisions of the Status Review Tribunals was confined to the Court of Appeals for the District of Columbia and the grounds available to it for review were restricted.<sup>23</sup> The factual basis for a Status Review Tribunal's decision could not be questioned in any way.

The Military Commissions Act of 2006 also reaffirmed Bush's policies.<sup>24</sup> It expanded the 2005 ban on the writ of habeas corpus, by extending the ban to all unlawful enemy combatants, regardless of where they might be held, and by making it clear that the ban was applicable to all pending cases.<sup>25</sup> In addition, the

---

<sup>19</sup> Presidential Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005), *available at* <http://www.presidency.ucsb.edu/ws/index.php?%20pid=65259> (declaring that “[t]he Executive branch shall construe” the prohibition “in a manner consistent with the constitutional authority of the President . . . to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power” in order to “protect[] the American people from further terrorist attacks”).

<sup>20</sup> *See* U.S. CONST. art. I, § 8, cl. 11–15.

<sup>21</sup> Detainee Treatment Act of 2005 § 1005(e)(1).

<sup>22</sup> *Id.* § 1005(e)(2).

<sup>23</sup> *Id.*

<sup>24</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3, § 948b(a), 120 Stat. 2600, 2602.

<sup>25</sup> *Id.* § 7.

2006 Act authorized the president to use military commissions to try so-called unlawful enemy combatants and thus endorsed the position Bush had taken in his November 2001 Executive Order.<sup>26</sup> Admittedly, some of the procedures originally contemplated by Bush when he issued his Executive Order were disallowed by Congress. Congress gave the accused the right to hear the evidence against him and limitations were placed on the use of confessions obtained through torture.<sup>27</sup> Congress also required that the accused had to be notified in advance that hearsay was to be used.<sup>28</sup> Still, the essential due process defects of military commissions remained—trial by military officers, supervision by a political appointee, permissive evidentiary rules, no right to a jury trial, and no right to a speedy or public trial. Moreover, like Bush's initial Executive Order, the 2006 Act allowed the trial for offenses, such as giving material support to a belligerent, that were not proscribed by the laws of war.<sup>29</sup> And, as was true of the Executive Order, the 2006 Act confined the use of military commissions to the trial of foreign nationals, which not only raised questions of equal protection, but also testified to the second-class character of the justice the commissions were likely to render—it was not good enough for Americans.

Congress also gave the president the authority to conduct wiretaps without court authorization.<sup>30</sup> Although the NSA warrantless wiretap program was authorized by Bush immediately following the 9/11 attacks, it was not publicly disclosed until December 2005. In the period immediately following that disclosure, many complained that the NSA program violated the warrant requirement established in 1978 under the Foreign Intelligence Surveillance Act. The attorney general insisted otherwise but, even more audaciously, claimed that the president's action was within his powers as commander in chief and thus could not be limited by Congress.<sup>31</sup>

In January 2007, the attorney general announced that the president was voluntarily, as a matter of policy, abandoning the NSA program.<sup>32</sup> However, in August 2007, Congress passed legislation—the Protect America Act—that allowed the executive to wiretap, without warrants, telephone calls abroad to persons suspected of Al Qaeda ties.<sup>33</sup> In 2008, another statute—known as the FISA

---

<sup>26</sup> *Id.* § 3(a)(1).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552; FISA Amendments Act of 2008, Pub. L. No. 110-261, sec. 201, § 802, 122 Stat. 2436, 2468–70 (to be codified in scattered sections of 50 U.S.C.).

<sup>31</sup> See Alberto Gonzales, Prepared Statement of Hon. Alberto R. Gonzales, Attorney General of the United States (Feb. 6, 2006), *available at* [http://www.justice.gov/archive/ag/speeches/2006/ag\\_speech\\_060206.html](http://www.justice.gov/archive/ag/speeches/2006/ag_speech_060206.html).

<sup>32</sup> Letter from Alberto Gonzales, Attorney General, to Senators Patrick Leahy and Arlen Specter, Chairmen of the Comm. on the Judiciary (Jan. 17, 2007), *available at* [graphics8.nytimes.com/packages/pdf/politics/20060117gonzales\\_Letter.pdf](http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf).

<sup>33</sup> Protect America Act of 2007, 121 Stat. 552.

Amendments Act of 2008—was enacted that extended the authorization of the 2007 Act for warrantless wiretaps.<sup>34</sup> The 2008 Act also protected the telephone carriers who had participated in the NSA program from any liability for their wrongdoing.<sup>35</sup>

In each of these measures—the Detainee Treatment Act of 2005, the Military Commission Act of 2006, and the authorization for warrantless wiretaps of the 2007 and 2008 Acts—Congress endorsed a number of Bush’s counterterrorism policies that offended the Constitution. The Supreme Court’s endorsement was more oblique and harder to discern, but nevertheless a reality and deeply disturbing. Even when the government was rebuffed, the defense of the Constitution was weak and compromised.

In a June 2004 ruling involving an American citizen who had allegedly fought for the Taliban, the Supreme Court held as a matter of due process that the prisoner was entitled to an evidentiary hearing on his claim that he had not taken up arms against the United States.<sup>36</sup> This victory was compromised, however, when Justice O’Connor, writing for the Court, fashioned the particular procedural rules to govern these hearings.<sup>37</sup> She further compromised her stance on due process when she declared—now only for four justices—that the required evidentiary hearing need not be held before federal courts sitting in habeas, but instead could be conducted by a properly constituted military tribunal.<sup>38</sup> Indeed, it was this pronouncement that guided the Department of Defense, anxious to defeat any claims to habeas, to establish the Combatant Status Review Tribunals on Guantánamo in July 2004, only a month after the Court’s ruling. If a military tribunal is good enough to determine whether an American had taken up arms against the United States, the secretary of defense must have reasoned, it certainly is good enough for foreign nationals.

In a companion case also involving an American citizen—this time seized in Chicago, transferred to New York, and then held in a Naval brig in South Carolina as an enemy combatant—the Supreme Court refused to pass on the merits of his habeas petition.<sup>39</sup> The opinion was written by Chief Justice Rehnquist, who, clinging to the most arcane technicality, said that the prisoner should have filed his petition in the South Carolina, rather than the New York, federal district court.<sup>40</sup> This ruling was handed down in June 2004, almost three years after the War on Terror had begun and after the prisoner had been held incommunicado for more than two years. Subsequently, the prisoner filed a habeas petition in the South Carolina district court and that court soon granted it.<sup>41</sup> However, that decision was

---

<sup>34</sup> FISA Amendments Act of 2008, 122 Stat. at 2468–70.

<sup>35</sup> *Id.* § 101(a)(2).

<sup>36</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

<sup>37</sup> *Id.* at 324–39.

<sup>38</sup> *Id.* at 338–39.

<sup>39</sup> *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

<sup>40</sup> *Id.* at 442–47.

<sup>41</sup> *Padilla v. Hanft*, 389 F. Supp. 2d 678, 692 (D.S.C. 2005).



reversed by the United States Court of Appeals for the Fourth Circuit.<sup>42</sup> The prisoner then sought review by the Supreme Court, but when the moment came to respond to the prisoner's application for certiorari, and in an obvious attempt to avoid Supreme Court review of its policy of imprisonment without trial, the Bush administration reversed course and charged the prisoner with a crime in a Florida district court. On April 3, 2006, the Supreme Court failed to confront this transparently evasive strategy and denied the prisoner's application for certiorari.<sup>43</sup>

The Court's policy of avoidance also governed its treatment of the Guantánamo prisoners' attempts to obtain habeas corpus. Prior to reaching the Supreme Court, the United States Court of Appeals for the District of Columbia embraced the administration's position and denied the Guantánamo prisoners the writ on the ground that they had no constitutional rights. As the court of appeals said, "[w]e cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not."<sup>44</sup> However, rather than address this ruling in any direct way, the Supreme Court in a June 2004 ruling held that under the very terms of the statute, habeas was available to Guantánamo prisoners as long as the jailor (in this instance the secretary of defense) was within the jurisdiction of the habeas court.<sup>45</sup>

Congress responded to this interpretation of the habeas statute by enacting the Detainee Treatment Act of 2005. In it, Congress amended the habeas statute to deny the writ to the Guantánamo prisoners and make the Combatant Status Review Tribunals their exclusive remedy.<sup>46</sup> The legality of this feature of the statute was before the Supreme Court in June 2006, but the Court once again avoided deciding whether the Guantánamo prisoners had a right to habeas corpus that was protected by the Constitution. Rather, the Court held, through a strained interpretation, that the ban on habeas of the 2005 statute did not apply to a case such as the one then before it, which had been pending at the time of enactment.<sup>47</sup>

In October 2006, as part of the Military Commissions Act, Congress once again amended the habeas statute. It made the ban on habeas applicable to all persons held as unlawful enemy combatants, regardless of where they might be held, and also made it abundantly clear that the ban was applicable to all pending cases "without exception."<sup>48</sup> In reviewing this measure in a case arising from Guantánamo, the court of appeals acknowledged the applicability of the ban on habeas to the case before it, even though it had been pending at the time of enactment. The court went on to uphold the ban, once again denying that the Guantánamo prisoners had any constitutional rights that might be protected by the

---

<sup>42</sup> *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005).

<sup>43</sup> *Padilla v. Hanft*, 547 U.S. 1062 (2006).

<sup>44</sup> *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003).

<sup>45</sup> *Rasul v. Bush*, 542 U.S. 466, 483–85 (2004).

<sup>46</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2740–44 (codified at 42 U.S.C. § 2000dd (2006)).

<sup>47</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 572–84 (2006).

<sup>48</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(b), 120 Stat. 2600, 2636.

writ.<sup>49</sup> In June 2008, the Supreme Court finally held—more than six years after the prison opened—that the Guantánamo prisoners were entitled, as a constitutional matter, to have their imprisonment reviewed by a writ of habeas corpus. But the majority opinion, written by Justice Kennedy, failed to address the view of the court of appeals that denied the protection of the Bill of Rights to foreign nationals being held abroad.

In this decision, styled *Boumediene v. Bush*,<sup>50</sup> Justice Kennedy depicted the provision of the Constitution protecting the writ of habeas corpus as an instrument of separation of powers.<sup>51</sup> He saw separation of powers as furthering freedom in general, but on his account, freedom was only a residue.<sup>52</sup> Freedom was not a right directly conferred on the Guantánamo prisoners by the Constitution or Bill of Rights, but rather was derived from any habeas court decision holding that a prisoner was not an enemy combatant and thus could not be lawfully imprisoned by the executive.<sup>53</sup> Justice Kennedy most emphatically did not declare that the Guantánamo prisoners enjoyed the protection of the Bill of Rights—protections that might enable a Guantánamo prisoner determined in a habeas proceeding to be an enemy combatant to challenge prolonged detention without trial or the use of military commissions to try him for whatever he had done in the war, or to protect against the use of so-called enhanced interrogation techniques (torture). Remarkably, all of that was left for yet another day.

The limitations of the *Boumediene* decision were also evident in the test Kennedy announced for determining when habeas would be available. He did not hold, as he might have, that the writ must be available whenever or wherever a prisoner is held in a secure detention facility by an American official, but rather made his decision turn on a multivariate test. According to Kennedy, the availability of the writ depended on (1) the citizenship of the prisoner, (2) the prisoner's status, (3) the adequacy of the process through which his status was determined, (4) the nature of the site of apprehension, (5) the nature of the site of detention, and (6) the practical difficulties in resolving the prisoner's claim of freedom.<sup>54</sup> Of course, we have become accustomed in the law to multivariate tests, but usually, as with the famed *Matthews v. Eldridge*<sup>55</sup> test, the numbered factors are meant to pursue or serve a single unifying principle. Some factors identified in *Boumediene*, by contrast, bore little relationship to the separation of powers principle that was allegedly the foundation of the decision. As a result, no one could tell how the test might apply to other detention facilities abroad, such as the one maintained by the United States at the Bagram Air Force base in Afghanistan, which was also used to detain suspected terrorists and, at the time, held close to six hundred prisoners.

---

<sup>49</sup> *Rasul v. Myers*, 512 F.3d 644, 665 (D.C. Cir. 2008).

<sup>50</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>51</sup> *Id.* at 764–66.

<sup>52</sup> *Id.* at 796–98.

<sup>53</sup> *Id.* at 753–71.

<sup>54</sup> *Id.* at 766.

<sup>55</sup> 424 U.S. 319 (1976).

On November 4, 2008, only months after the *Boumediene* decision, Barack Obama was elected president of the United States. This was a transcendent moment in the history of a nation founded on slavery. There was also reason to believe that Obama might repudiate many of the Bush policies that offended the Constitution. Obama had campaigned on a platform that promised change, and many understood that promise to reach Bush's counterterrorism policies. Obama gave further credence to this belief when, in his inaugural address, he rejected the notion that the fight against terrorism required us to betray our ideals. For the most part, however, Obama has not been true to this promise. Although he withdrew the last combat troops from Iraq in August 2010 and has been meticulous in avoiding the use of the phrase "War on Terror," Obama has frequently declared that we are at war with Al Qaeda and the Taliban, and in the name of these wars, has continued many of the unconstitutional policies of Bush.

As his first order of business, Obama issued an Executive Order banning torture.<sup>56</sup> He thus reaffirmed the constitutional principle codified by McCain's addition to the Detainee Treatment Act of 2005 and removed the doubt created by the statement Bush had made on signing that Act. Obama also minimized the risk of torture by issuing orders that same day closing the secret prisons maintained abroad by the CIA—the so-called black sites<sup>57</sup>—and requiring the CIA to follow the Army Field Manual when interrogating suspects.<sup>58</sup>

Yet we must take account of the fact that Obama quickly brushed aside calls for criminal prosecutions and truth commissions to investigate the abusive interrogation practices of the previous administration. After a public outcry, his attorney general opened an investigation on a CIA interrogator accused of going beyond agency guidelines.<sup>59</sup> The alleged crime was not waterboarding, which appears to have been authorized by higher officials—perhaps, if his memoir is to be believed, by Bush himself. Rather, the agent was accused of threatening a hooded and shackled prisoner with imminent death first by revving an electric drill near the prisoner's head and then by cocking a semi-automatic handgun in the same position. The investigation of this rogue agent was opened in August 2009 and we still do not know what might come of it. For the most part, the president has insisted, even with as gross an offense as torture, that he is interested in the future, not the past, without understanding that how one treats the past partly determines what will happen in the future.

Obama can also be faulted for not disavowing the practice of extraordinary rendition with any clarity. In fact, on two notable instances, one in the Ninth Circuit and the other in the Second Circuit, the Obama administration sought to block judicial inquiries into renditions conducted by the Bush administration. These proceedings were brought by victims of rendition and were pending before

---

<sup>56</sup> Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009).

<sup>57</sup> Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

<sup>58</sup> Exec. Order No. 13,491, 74 Fed. Reg. at 4,894.

<sup>59</sup> Carrie Johnson, *Prosecutor to Probe CIA Interrogations*, WASH. POST, Aug. 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/24/AR2009082401743.html>.

appellate courts when Obama took office. In one, Obama's lawyers relied on the state secrets doctrine, transforming what was originally an evidentiary privilege into a de facto grant of immunity to the CIA.<sup>60</sup> In the other, his lawyers claimed that any judicial inquiry into the practice of extraordinary rendition would compromise the executive's authority over military and foreign affairs.<sup>61</sup>

In contrast to Bush, Obama has been reluctant to treat the United States as part of the battleground against Al Qaeda and the Taliban. Accordingly, he placed within the ambit of the criminal justice system two terrorist suspects who were seized in the United States on his watch. One was an American citizen attempting to detonate a bomb in Times Square<sup>62</sup> and the other a citizen of Nigeria attempting to detonate a bomb on a Northwest Airlines flight as it was about to land in Detroit.<sup>63</sup> Yet, Obama invoked the war exception to the principle of freedom as the basis for continuing the imprisonment without trial of prisoners being held in Guantánamo and at the Bagram Air Force base in Afghanistan. Bush had claimed this power as commander in chief. Anxious to avoid the unilateralism of Bush, Obama did not invoke his authority as commander in chief to justify this policy, but instead relied on the statute passed by Congress immediately after 9/11, which did no more than authorize the president to use force in responding to the terrorist attacks on that day.

Although on occasion Bush tried Al Qaeda suspects in civilian courts, he also claimed the authority to try some before military commissions and did so without announcing the criteria to govern the choice between tribunals. Obama claims the same authority. Obama made headlines when he first announced that he would try the alleged mastermind of 9/11, Khalid Sheik Mohammed, in the Southern District Court of New York,<sup>64</sup> but the controversy that erupted over this announcement should not blind us to the fact that Obama is prepared to try some of the Guantánamo prisoners before military commissions and now is in the process of doing so. Like Bush, Obama has failed to announce any meaningful criteria governing this choice of tribunal.

As a senator, Obama voted against the Military Commissions Act of 2006, which not only barred habeas corpus, but also authorized the use of military

---

<sup>60</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc).

<sup>61</sup> *Arar v. Ashcroft*, 585 F.3d 559, 574–78 (2d Cir. 2009) (en banc).

<sup>62</sup> Benjamin Weiser & Colin Moynihan, *Guilty Plea in Times Square Bomb Plot*, N.Y. TIMES, June 25, 2010, <http://www.nytimes.com/2010/06/22/nyregion/22terror.html>.

<sup>63</sup> Charlie Savage, *Nigerian Indicted in Terrorist Plot*, N.Y. TIMES, Jan. 7, 2010, at A14; Press Release, Dep't of Justice, Umar Farouk Abdulmutallab Indicted for Attempted Bombing of Flight 253 on Christmas Day (Jan. 6, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-nsd-004.html>.

<sup>64</sup> See, e.g., *Oversight of the Department of Justice: Hearing Before the S. Judiciary Comm.*, 111th Cong. (2009) (Statement of Attorney Gen. Eric Holder); see also Charlie Savage, *Holder Defends Decision to Use U.S. Court for 9/11 Trial*, N.Y. TIMES, Nov. 19, 2009, at A18.

commissions to try foreign nationals being held as unlawful enemy combatants.<sup>65</sup> As president, Obama sponsored the Military Commissions Act of 2009.<sup>66</sup> Admittedly, the principal purpose of this legislation was to strengthen the evidentiary rules governing military commissions. Under the Act, all coerced testimony was barred, the accused was given a reasonable opportunity to obtain evidence and witnesses, the government's obligation to disclose exculpatory evidence was expanded, and the accused was given the right to examine any evidence offered at trial. Moreover, the political officer convening a military commission was prohibited from punishing members of the commission for any of their rulings.

Still, the basic structural shortcoming of the commission—trial by military officers—persists. Indeed, the 2009 Act, building on Bush's initial Executive Order of November 2001 and the Military Commissions Act of 2006, represents a further institutionalization of military commissions as an irregular alternative the executive might choose—on criteria we will never know—for the prosecution of unlawful, or now, unprivileged enemy combatants. Much like the 2006 Act and Bush's November 2001 Executive Order, the 2009 Act defined the offenses that could be tried before a commission to include crimes, such as giving material aid to a belligerent, that could not properly be considered crimes under the laws of war.<sup>67</sup> The irregular nature of these military commissions was underscored by a provision in the 2009 Act, also present in the 2006 Act and the 2001 Executive Order, confining them to the trial of foreign nationals.

Obama has sought to follow through on his promise to close Guantánamo, and in December 2009, announced his plan to transfer the remaining Guantánamo prisoners to a prison in Thomson, Illinois. This plan has encountered congressional resistance and has not yet been implemented. It should be emphasized, however, that once Obama decided, as he did in May 2009, to continue the practice of using military commissions for the trial of some of the Guantánamo prisoners and to continue the policy of holding other Guantánamo prisoners for prolonged, indefinite detention without trial, the closure of Guantánamo has become a gesture of doubtful significance. Guantánamo became an object of public controversy and disapprobation, not just because it was viewed as a site where prisoners were tortured, but also because Bush had planned to use military commissions to try some of the prisoners being held there and to continue the imprisonment of others being held there without affording them a trial of any type.

The notoriety of Guantánamo had also arisen because Bush insisted that it lay beyond the reach of habeas corpus. It had become something of a legal black hole.<sup>68</sup> The June 2008 *Boumediene* decision relieved Obama of the need to take a

---

<sup>65</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2600.

<sup>66</sup> National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2574 (2009).

<sup>67</sup> See *supra* note 29 and accompanying text.

<sup>68</sup> Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004).

position on the availability of the writ of habeas corpus to the Guantánamo prisoners—the Supreme Court rejected Bush’s position<sup>69</sup>—but Obama has tried to limit the scope of that ruling, and in so doing, further denied the act of closing Guantánamo of much of its meaning. Obama’s lawyers have argued in open court that the *Boumediene* decision should be confined to Guantánamo alone and that the prison at Bagram—to which terrorism suspects from the four corners of the earth had been brought—was beyond the reach of the Constitution.

The district court applied the *Boumediene* criteria to Bagram and found that habeas is available to prisoners who were not Afghanistan citizens.<sup>70</sup> However, the court of appeals, also applying the *Boumediene* criteria, reversed this decision and denied habeas to any of the Bagram prisoners.<sup>71</sup> Now the petitioners are, with the blessing of the court of appeals,<sup>72</sup> back in the district court claiming that they have new evidence that would be relevant to the application of the *Boumediene* criteria, and further suggesting that the executive had used Bagram as a strategy for defeating any claims of habeas corpus or arguably, as the court of appeals put it, for “turn[ing] off the Constitution.”<sup>73</sup> Such protracted litigation is not at all surprising, given the multivariate test Justice Kennedy laid down in *Boumediene*, but what is remarkable and disturbing is that today Obama denies that habeas is available for the prisoners of Bagram, just as Bush had for the Guantánamo prisoners.

Finally, we must account for Obama’s position on the warrantless wiretaps that began during the Bush era. Bush claimed the authority to institute such surveillance as an incident of his power as commander in chief and insisted that as such, he was free to disregard the obligation to obtain a warrant imposed by FISA. Obama does not claim such executive prerogatives, nor need he. In the Protect America Act of 2007,<sup>74</sup> the president was authorized by Congress to engage in such eavesdropping, and this authorization was extended in the FISA Amendments Act of 2008.<sup>75</sup> As a senator, Obama voted against the 2007 Act. He fought the grant of immunity to the carriers eventually contained in the 2008 Act, but in the end, abstained from the vote on that measure. Since assuming office, Obama’s attorney general has indicated that he will vigorously defend the 2008 Act’s constitutionality.

We must of course be careful to note the differences between Bush and Obama, and yet the essential truth is one of continuity. Obama has not disavowed extraordinary rendition and has, in fact, sought to block judicial inquiries into that practice. Obama has continued the policy of imprisonment without trial. Obama

---

<sup>69</sup> *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

<sup>70</sup> *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 231–32 (D.D.C. 2009).

<sup>71</sup> *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

<sup>72</sup> *Al Maqaleh v. Gates*, No. 09-5265 (D.C. Cir. July 23, 2010).

<sup>73</sup> *Al Maqaleh*, 605 F.3d at 99 (internal quotation marks omitted). The proceedings are ongoing as of the time this lecture was delivered on October 26, 2010.

<sup>74</sup> Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552.

<sup>75</sup> FISA Amendments Act of 2008, Pub. L. No. 110-261, sec. 201, § 802, 122 Stat. 2436, 2468–70 (to be codified in scattered sections of 50 U.S.C.).

has sought to deny the writ of habeas corpus to the prisoners now being held in Bagram. Obama has continued to use military commissions to try terrorist suspects. And Obama has continued the policy of warrantless wiretaps. Obama sometimes announced these policies with reluctance, which was never Bush's style, but in the end, Obama overcame this reluctance and chose to sacrifice principle.

The reasons for Obama's perpetuation of Bush's policies are hard to fathom. Maybe Obama learned things about the nature of the terrorist threat that he did not know before. Maybe Obama compromised on these issues of principle in order to gain support for a number of his other policies—healthcare or economic recovery—all most worthy. Or maybe Obama has been unable to resist the momentum achieved by the Bush policies now that they have been endorsed by Congress and tolerated by the Supreme Court. I just do not know and we are likely never to know. Our concern should be, however, not with the reasons for Obama's actions, but rather with the consequences of his action, which are unmistakable and troubling.

At the beginning of the decade and in the immediate wake of 9/11, many of the abuses of the Constitution that I have identified were seen as aberrations, perhaps unilateral excesses of Bush and his close circle of advisors. Soon these practices received the endorsement of Congress and often the acquiescence of the Supreme Court. Now they have been endorsed by the new president, a lawyer who professes to be dedicated to the Constitution and the highest ideals of the nation. As a result, the transgressions of the Bush era, rather than being denounced as unworthy of our Constitution, have been institutionalized. They have become the official policies of our government and are routinely defended as constitutional. Not only must we today suffer these transgressions, but they will inevitably determine what is permissible in the future. They have shaped our understanding of what is acceptable, and may well serve as precedents for a less reluctant president.

Continued in this way, unconstitutional policies first initiated by Bush in the War on Terror have taken on a life of their own and have become durable features of our legal order. As such, they betray the proudest ideals of the nation, undermine one of the pillars of our self-understanding, and deny us—all of us, including Obama—the right to speak of the example of America as we once did—as a beacon for all the world.

